No. 387.

Brief of Carlisle for P. E.

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Nov. 28, 1899.

EBEN J. KNOWLTON and THOMAS A. BUFFUM, as Executors of and under the last Will and Testament of Edwin F. Knowlton, deceased,

Plaintiffs in Error,

against

FRANK R. MOORE, as United States Collector of Internal Revenue, First District, State of New York.

Defendant in Error.

No. 387.

BRIEF FOR PLAINTIFFS IN ERROR.

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STATEMENT.

Plaintiffs in Error filed their amended complaint in the Circuit Court of the United States for the Eastern District of the State of New York on the first day of June, A. D. 1899, against Frank R. Moore, as United States Collector of Internal Revenue, First District, State of New York, to recover the sum of $42,084.67-100 with interest from the 18th day of April A. D. 1899.

The amended complaint alleges the official position of the Defendant in Error; the death of Edwin F. Knowlton on the 25th day of October A. D. 1898, leaving a will, a copy of which was annexed to the amended complaint (Record, fols. 11 to 25). By his will, the testator made certain bequests hereinafter specified, and

appointed Plaintiffs in Error executors thereof. Said will was admitted to probate, and said executors qualified on November 14, 1898.

The total value of testator's personal estate passing to legatees was $2,559,899.67.

On March 31, 1899, Plaintiffs in Error, upon demand of the Defendant in Error made a schedule of legacies and of the taxes claimed thereon, as required by Section 30 of the Act of Congress of June 13, 1898, entitled: "An Act to provide Ways and Means to "meet War Expenditures and for other purposes," of which statement a copy is annexed to the complaint. (Record, fols. 29 to 32.)

From this statement, or schedule, it appears that legacies were bequeathed by said will to natural persons and corporations of the values respectively, and taxed respectively as follows:

Names of persons entitled to beneficial interest in said property.	Relationship of beneficiary to person who died possessed.	Clear value of legacy.	Legacies exempt.	Amount taxable.	Rate for every $100.	Amount of tax.
Mary, Countess von Francken Sierstorpff	Daughter.					
Furniture $1,065.						
Cash legacy 100,000.						
Income for life on residuary estate, amounting to $2,348,734.67. Countess Sierstorpff became 28 years of age on July 2, 1898. Present value of her life interest in said residuary estate, estimated according to United States tables, is $1,630,931.35						
Total		$1,731,996.35		$1,731,996.35	2.25	38,969.92
George W. Knowlton	Brother	100.00		100.00	2 25	2 25
Charlotte A. Batchelor	Sister	5,000.00		5,000.00	2.25	112.50
Eben J. Knowlton	Brother	100,000.00		100,000.00	2.25	2,250.00
Unitarian Church of West Upton, Mass	None	5,000 00		5,000.00	15.	750.00
The remainder of said residuary estate is subject to contingencies, and the individuals who will ultimately become entitled to the same or their degree of relationship to the testator cannot be determined until after the termination of two lives now in being. The present value of the said remainder of said residuary estate, estimated as aforesaid, is $717,803.30		717,803.30				
Total		$2,559,899.65		$1,842,096.35		42,084.67

Plaintiffs in Error protested, in writing, against the assessment of any tax, upon the following grounds:

"1. The provisions of the act of Congress under which it "is sought to impose, assess, and collect the said tax or duty "are in violation of the provisions of Article I, Sections 8 and "9, of the Constitution of the United States, and are, there- "fore, void.

"2. The legacies to George W. Knowlton, Charlotte A. "Batchelor, the Unitarian Church of West Upton, Mass., "each amount to less than $10,000, and are not subject to "any tax or duty under the said provisions of the said act "of Congress, even if such provisions be not unconstitutional "and void.

"3. The legacy to Eben J. Knowlton, a brother of the "testator, amounts to only $100,000, and under the said pro- "visions of the said act should be taxed at the rate of $1.12½ "per $100, and not at the rate of $2.25 per $100, even if said "act be not unconstitutional and void.

"4. We hereby declare that the rates and amounts of the "tax or duty above set down were so set down in the fore- "going statement at the direction of the Collector of Inter- "nal Revenue for the first district of New York, and we "hereby protest against such direction."

The Defendant in Error made return of the said statement and protest to the Commissioner of Internal Revenue, who, on April 12, 1899, assessed against the Plaintiffs in Error a tax of $42,084.67, as above set forth, and transmitted the same to the Defendant in Error for collection.

On April 12, 1899, the defendant, as Collector, caused to be served upon the plaintiffs a notice in writing that the said tax had been assessed, and demanded payment.

On April 17, 1899, plaintiffs caused to be delivered to the defendant a further written protest against the assessment of the said tax upon the same grounds above stated, and refused to make payment of the same.

On April 17, 1899, plaintiffs received from the defendant a notice threatening the addition of five per cent. penalty and issuance of distraint warrant, unless the tax were paid.

(Exhibit "E," Record, fols. 35, 36).

On April 18, 1899, under compulsion of the said threat, and to prevent the addition of the penalty, and to prevent issuance and execution of distraint warrant to enforce the collection of the tax, plaintiffs paid the tax to the defendant, under protest, by their certified check and at the same time delivered to the defendant, a further protest in writing upon the same grounds above set forth.

(Exhibits "F" and "G." Record, fols. 38 to 41).

Upon the delivery of the said certified check of $42,084.67 the defendant delivered to the plaintiffs duplicate receipts therefor, showing that the payment had been made under protest.

(Exhibit "H," Record, fol. 41).

On April 20, 1899, plaintiffs made an appeal in writing to the United States Commissioner of Internal Revenue to remit, refund, and pay back to them the amount so paid under protest, stating the grounds upon which said refund and repayment were requested, substantially as above set forth.

(Exhibit "I," Record, fols. 42 to 48).

On May 8, 1899, the United States Commissioner of Internal Revenue denied and rejected the said appeal and claim of the plaintiffs, and refused to remit and refund the said tax or any part thereof, and the defendant, on May 10, 1899, caused to be served upon the plaintiffs a written notice of such denial and rejection.

(Exhibits "J" and "K." Record, fols. 48, 49.)

The amended complaint then alleges:

That "the said alleged assessment and tax are wholly illegal, "null and void and of no force or effect for that the provisions "of the aforesaid Act of Congress under which it was sought "to impose and assess the said duty or tax are unconstitu- "tional and void and especially are in direct violation of the "provisions of Article 1, Sections 8 and 9 of the Constitution "of the United States, which are as follows: Art. I, Section "8. The Congress shall have the power

"Sub. 1. To lay and collect taxes, duties, imposts and ex- "cises; to pay the debts and provide for the common defense "and general welfare of the United States; but all duties, "imposts and excises shall be uniform throughout the United "States.

"Art. I, Section 9, Sub. 4. No capitation or other direct "tax shall be laid unless in proportion to the census or enum- "eration hereinbefore directed to be taken."

Judgment was demanded for $42,084.67 with interest.

The defendant by George H. Pettit, United States Attorney for the Eastern District of New York, filed a demurrer to the said amended complaint upon the ground "that it appears on the face "of said amended complaint that the same does not state facts suffi- "cient to constitute a cause of action."

The issue of law thus raised came on for argument, in the United States Circuit Court for the Eastern District of New York, before Hon. Edward B. Thomas, in July, A. D. 1899. On the 17th day of July, A. D. 1899, an order was entered directing that the demurrer be sustained and dismissing the amended complaint with costs to the defendant, which were taxed at Thirteen 10-100 dollars. On the 19th day of July, A. D. 1899, judgment was entered accordingly.

Following is a copy of Section 29 of the War Revenue Law, taxing legacies and distributive shares.

"LEGACIES AND DISTRIBUTIVE SHARES OF PERSONAL PROPERTY.

"Sec. 29. That any person or persons having in charge or "trust, as administrators or executors, or trustees, any lega- "cies or distributive shares arising from personal property, "where the whole amount of such personal property as afore- "said shall exceed the sum of ten thousand dollars in actual "value, passing, after the passage of this act, from any person "possessed of such property, either by will or by the intestate "laws of any state or territory, or any personal property "or interest therein, transferred by deed, grant, bargain, sale, "or gift, made or intended to take effect in possession or en- "joyment after the death of the grantor or bargainer, to any "person or persons, or to any body or bodies, politic or cor- "porate, in trust or otherwise, shall be, and hereby are, "made subject to a duty or tax to be paid to the United "States, as follows—that is to say: Where the whole amount "of said personal property shall exceed in value ten thousand "and shall not exceed in value the sum of twenty-five thou- "sand dollars the tax shall be:

"*First*—Where the person or persons entitled to any bene-
"ficial interest in such property shall be the lineal issue or
"lineal ancestor brother or sister to the person who died pos-
"sessed of such property as aforesaid, at the rate of seventy-
"five cents for each and every hundred dollars of the clear
"value of such interest in such property.

"*Second*—Where the person or persons entitled to any
"beneficial interest in such property shall be the descendant
"of a brother or sister of the person who died possessed, as
"aforesaid, at the rate of one dollar and fifty cents for each
"and every hundred dollars of the clear value of such interest.

"*Third*—Where the person or persons entitled to any
"beneficial interest in such property shall be the brother or
"sister of the father or mother, or a descendant of a brother
"or sister of the father or mother of the person who died
"possessed as aforesaid, at the rate of three dollars for each
"and every hundred dollars of the clear value of such
"interest.

"*Fourth*—Where the person or persons entitled to any
"beneficial interest in such property shall be the brother
"or sister of the grandfather or grandmother, or a descendant
"of the brother or sister of the grandfather or grandmother,
"of the person who died possessed as aforesaid, at the rate
"of four dollars for each and every hundred dollars of the clear
"value of such interest.

"*Fifth*—Where the person or persons entitled to any ben-
"eficial interest in such property shall be in any other degree
"of collateral consanguinity than is hereinbefore stated, or
"shall be a stranger in blood to the person who died pos-
"sessed, as aforesaid, or shall be a body politic or corporate,
"at the rate of five dollars for each and every hundred dol-
"lars of the clear value of such interest: Provided, That
"all legacies or property passing by will, or by the laws of
"any state or territory, to husband or wife of the person
"died possessed as aforesaid, shall be exempt from tax or
"duty.

"Where the amount or value of said property shall exceed
"the sum of twenty-five thousand dollars, but shall not ex-
"ceed the sum or value of one hundred thousand dollars, the
"rates of duty or tax above set forth shall be multiplied by
"one and one-half; and where the amount or value of said

"property shall exceed the sum of one hundred thousand "dollars, but shall not exceed the sum of five hundred "thousand dollars, such rates of duty shall be multiplied by "two; and where the amount or value of said property "shall exceed the sum of five hundred thousand dollars, but "shall not exceed the sum of one million dollars, such rates "of duty shall be multiplied by two and one-half; and where "the amount or value of said property shall exceed the sum "of one million dollars, such rates of duty shall be multi- "plied by three."

Assignment of Errors.

I. The Court erred in holding that Sections Twenty-nine and Thirty of the Act of Congress, approved July 13, 1898, entitled, "An Act to provide Ways and Means to Meet War Expenditures, "and for other Purposes," which provided for the imposition, assessment, and collection of a tax on the personal property belonging to the estates of decedents, when the same exceeded Ten thousand dollars in value, were not enacted in violation of Article 1, Section 9, Subdivision 4 of the Constitution of the United States, which provides that "No Capitation or other Direct Tax shall be laid "unless in Proportion to the Census or Enumeration hereinbefore "directed to be taken."

II. The Court erred in holding that the taxes or duties imposed by the said Sections Twenty-nine and Thirty were uniform throughout the United States, and therefore were not enacted in violation of Article I, Section 8, Subdivision I of the Constitution of the United States, which provides that the Congress shall have the power "To lay and collect Taxes, Duties, Imposts, and "Excises; to pay the Debts, and provide for the Common Defense "and General Welfare of the United States; but all duties, im- "posts and excises shall be uniform throughout the United "States."

III. The Court erred in sustaining the demurrer to the amended complaint.

IV. The Court erred in not overruling the demurrer to the amended complaint.

V. The Court erred in dismissing the amended complaint and rendering judgment against the plaintiffs.

This brief discusses but one of the grounds of the unconstitutionality of the United States Succession Tax law, namely—

Assuming the tax to be indirect, it violates the Constitutional restriction that "all duties, imposts and excise shall be uniform "throughout the United States."

We contend:

1. That the word "uniform" in the constitutional provision quoted is synonymous with "equal."

2. That the so-called "geographical" sense in which the word "uniform" is used, is, that the indirect tax imposed shall be "uniform" in every part of the United States, considered as one government; not, that it may be inherently unequal in any single state, if the same inequality be maintained throughout all other states.

3. That independently of any constitutional restriction, approximate equality is an inherent and essential condition of all taxation.

4. That the Act in question necessarily discriminates against the rich, in that it taxes the rich at a higher *rate*, the *rate* increasing as the *amount* of taxable property increases, and

5. Attempts to create taxable classes, based upon wealth, varying the *rate* of tax upon the *same kind of taxable property* in the hands of the *same class of taxable persons;* according to the *amount of taxable property* received by them.

POINTS.

I.

If the tax sought to be imposed by Sections 29 *and* 30 *of the War Revenue Law, be an indirect tax and subject only to the constitutional restriction that "all duties, imposts, and excises shall be uni-"form throughout the United States," the tax is not uniform, and is therefore void.*

a. *What is the true meaning of the words "uniform through-"out the United States," as used in the Constitution?*

The Standard Dictionary, Vol. II, p. 1971.

"Uniform a. * * *

"4. Law. Conforming to one unvarying rule or standard; "operating equally on all persons or all property within a "given jurisdiction; as a *uniform* rule of construction; a uni- "form law of taxation."

The earliest case in this court in which this subject was discussed is Hylton vs. United States, 3 Dallas, 171, decided in the year 1795, only six years after the United States Constitution took effect. The decision was participated in by three justices, Ellsworth, Paterson, and Wilson, who had been members of the Constitutional Convention. Their interpretation of the constitutional provision in question has especial value, by reason of its proximity in time to the adoption of the Constitution.

At page 180, Mr. Justice Paterson writes:

"Apportionment is an operation on States, and involves "valuations and assessments, which are arbitrary, and should "not be resorted to but in case of necessity. *Uniformity is* "*an instant operation on individuals*, without the interven- "tion of assessments, or any regard to States, and is at once "easy, certain, and efficacious."

At page 181, Mr. Justice Iredell writes:

"If it can be considered as a tax, neither direct within the "meaning of the Constitution, nor comprehended within the "term duty, impost, or excise, there is no provision in the "Constitution, one way or another, and then it must be left "to such an operation of the power, as if the authority to lay "taxes had been given generally in all instances, without say- "ing whether they should be apportioned or uniform; and in "that case, I should presume, the tax ought to be uniform; "*because the present Constitution was particularly intended to* "*affect individuals, and not States*, except in particular cases "specified. And this is the leading distinction between the "articles of Confederation and the present Constitution."

Pomeroy's Constitutional Law (Bennett's Edition), Section 280:

"Imposts, duties and excises, whether laid upon imported "goods, upon the instruments of foreign commerce, or upon "internal articles, productions and labor, are only required to "be uniform throughout the United States; that is, the *rate*

"*fixed for any article or subject must be the same in all* "*parts of the country.* It is not necessary that all articles "should be subjected to the burden, or that all upon which a "tax is laid should bear the same rate. *But when a rate has* "*been determined for any one subject, that must be retained* "*for the same species in all the States.* Neither is it neces- "sary to ascertain at the outset the total amount to be raised, "or to divide it among the States. In laying and collecting "indirect taxes, the Government *touches the individual* apart "from any of his relations to the State of which he is an in- "habitant."

Section 287:

"When Congress sees fit to lay and collect duties upon "imported goods, they may demand any amount which is "deemed proper in their own discretion. The only limit upon "their power is that they must fix *the same rate for the same* "*article in all parts of the country.* Uniformity is the consti- "tutional rule.

"* * * * When Congress resorts to the system of ex- "cises, they may demand any percentage of incomes, any "sums as license fees for carrying on particular business, any "portion of the amounts paid upon the amount of sales, any "value of stamps upon written instruments or articles of "merchandise. The only limitation is, that the rule of uni- "formity must prevail throughout the United States. This "rule does not require that all trades, businesses, merchan- "dise, written instruments, and the like, shall be taxed alike, "or even taxed at all. It means that when an impost is "placed upon one article, *the same burden shall be borne by* "*that subject in all parts of the country.* Congress may dis- "criminate between articles in all the several species of indi- "rect taxes. The discrimination may be unfair and impolitic, "but it is not illegal."

Pollock vs. Farmers' Loan and Trust Co., 157 U. S., 592, Mr. Justice Field writes:

"The uniformity thus required is the uniformity through- "out the United States of the duty, impost, and excise levied. "That is, the tax levied cannot be one sum upon an article at "one place and a different sum upon the same article at an-

"other place. The duty received must be the same at all "places throughout the United States, *proportioned to the* "*quantity of the article disposed of or the extent of the business* "*done.* If, for instance, one kind of wine or grain or produce "has a certain duty laid upon it *proportioned to its quantity* in "New York, it must have a like duty *proportioned to its* "*quantity* when imported at Charleston or San Francisco, or "if a tax be laid upon a certain kind of business *proportioned* "*to its extent* at one place, it must be a like tax on the same "kind of business *proportioned to its extent* at another place. "In that sense the duty must be uniform throughout the Uni- "ted States.

"It is contended by the government that the Constitution "only requires an uniformity geographical in its character. "that position would be satisfied if the same duty were laid in "all the states, however variant it might be in different places "of the same state. But it could not be sustained in the lat- "ter case without defeating the equality which is an essential "element of the uniformity required, so far as the same is "practicable.

"In United States vs. Singer, 82 U. S. (15 Wall.) 111, 121, "a tax was imposed upon a distiller, in the nature of an excise "and the question arose whether in its imposition upon differ- "ent distillers the uniformity of the tax was preserved, and "the court said: 'The law is not in our judgment subject to "'any constitutional objection. The tax imposed upon the dis- "'tiller is in the nature of an excise, and the only limitation "'upon the power of Congress in the imposition of taxes of "'this character is that they shall be uniform throughout the "'United States. The tax here is uniform in its operation; "'*that is, it is assessed equally upon all manufacturers of spirits* "'*wherever they are.* The law does not establish one rule for "'one distiller and a different rule for another, but the same "'rule for all alike.'

"In the Head Money cases 112 U. S. 580, 594, a tax was "imposed upon the owners of steam vessels for each passenger "landed at New York from a foreign port, and it was objected "that the tax was not levied by any rule of uniformity, but "the court by Justice Miller, replied: 'The tax is uniform "'when it operates with the same force and effect in *every* "'place where the subject of it is found. The tax in this case,

" ' which, as far as it can be called a tax, is an excise duty on
" ' the business of bringing passengers from foreign countries
" ' into this, by ocean navigation, is uniform and operates pre-
" ' cisely alike in every port of the United States where such
" ' passengers can be landed.' In the decision in that
" case, in the circuit court (18 Fed. Rep. 135, 139)
" Mr. Justice Blatchford, in addition to pointing out that 'the
" ' Act was not passed in the exercise of the power of laying
" ' taxes,' but was a regulation of commerce, used the following
" language: 'Aside from this, the tax applies uniformly to all
" ' steam and sail vessels coming to all ports in the United
" ' States, from all foreign ports, with all alien passengers. The
" ' tax being a license tax on the business, *the rule of uniform-*
" ' *ity is sufficiently observed if the tax extends to all persons of*
" ' *the class selected by Congress: that is, to all owners of such*
" ' *vessels.* Congress has the exclusive power of selecting the
" ' class. It has regulated that particular branch of commerce
" ' which concerns the bringing of alien passengers,' and that
" taxes shall be levied upon such property as shall be pre-
" scribed by law. The object of this provision was to prevent
" unjust discriminations. It prevents property from being
" classified and taxed as classed, by different rules. *All kinds*
" *of property must be taxed uniformly, or be entirely exempt.*
" The uniformity must be coextensive with the territory to
" which the tax applies.

" Mr. Justice Miller, in his lectures on the Constitution
" (N. Y., 1891), pp. 240, 241, said of taxes levied by Congress:
" ' The tax must be uniform on the *particular article;* and it is
" ' uniform, within the meaning of the constitutional require-
" ' ment, if it is made to bear the *same percentage* over all the
" ' United States. That is manifestly the meaning of this
" ' word as used in this clause. The framers of the Constitu-
" ' tion could not have meant to say that the government, in
" ' raising its revenues, should not be allowed to discriminate
" ' between the *articles which* it should tax.' In discussing gen-
" erally the requirement of uniformity found in state constitu-
" tions, he said: 'The difficulties in the way of this construc-
" ' tion have, however, been very largely obviated by the mean-
" ' ing of the word " uniform," which has been adopted, holding
" ' that the uniformity *must refer to articles of the same class.*
" ' *That is, different articles may be taxed at different amounts*

"'*provided the rate is uniform on the same class everywhere,*
"'*with all people, and at all times.*'

"One of the learned counsel puts it very clearly when he "says that the correct meaning of the provisions requiring "duties, imposts, and excises to be 'uniform throughout the "'United States' is, that the law imposing them should 'have "'an equal *and* uniform application in every part of the "'Union.'"

Mr. Justice Brown, 158 U. S. Rep., 693, writes:

"Irrespective, however, of the Constitution, a tax which is "wanting in uniformity among members of the same class is, "or may be invalid. But this does not deprive the legislature "of the power to make exemptions."

In the former income tax case, Pacific Ins. Co. vs Soule, 74 U. S. (7 Wall), 433, Mr. Justice Swayne at p. 466, discussing the taxing power of Congress, writes:

"The taxing power is given in the most comprehensive "terms. The only limitations imposed are: that *direct taxes*, "including the capitation tax, shall be *apportioned;* that du- "ties, imposts, and excises shall be *uniform;* and that no du- "ties shall be imposed upon articles exported from any state. "With these exceptions, the exercise of the power is, in all "respects unfettered."

It will be observed that there is here no suggestion of the so-called *geographical* uniformity, but only that "duties, imposts and excises shall be uniform" in all places:

Story on the Constitution, Sec. 999, quoting Chief Justice Marshall in Loughborough vs. Blake, 5 Wheat., 318, 319:

"The power, then, to lay and collect duties, imposts and ex- "cises may be exercised *and must be exercised throughout the* "*United States.* Does this term designate the whole, or any "particular portion of the American empire? Certainly this "question can admit of but one answer. It is the name given "to our great Republic, which is composed of States and Terri- "tories. The District of Columbia, or the territory west of "the Missouri, is not less within the United States than "Maryland or Pennsylvania; and it is not less necessary, on "the principles of our Constitution, that uniformity in the

" imposition of imposts, duties, and excises should be ob-
" served in the one than in the other."

The word " uniform," as used in State Constitutions and as construed by the State Courts is interchangeable with " equal."

Johnston vs. Macon, 62 Ga., 645, 651.
Bureau Co. vs. Chicago, etc. R. R., 44 Ill., 229.
Chicago & N. W. R'y Co. vs. Boone Co., 44 Ill., 240.
Prim vs. Belleville, 59 Ill., 142.
Gunnison Co. vs. Owen, 7 Col., 467.
Gilman vs. Sheboygan, 54 U. S. (2 Black), 510.
Glasgow vs. Rowse, 43 Mo., 479, at p. 489, Wagner, *J.*

" In reference to taxation, the Constitution is not so much
" to be regarded a grant of power as a restriction or limitation
" of power. *That taxes should be uniform, and levied in pro-*
" *portion to the value of the property to be taxed*, is so mani-
" festly just that it commends itself to universal assent."

State vs. Hannibal, etc., R. R. Co., 75 Mo., 208, Sherwood, *C. J.*, at p. 211.

" Besides, the idea of taxation imports the equality of ap-
" portionment and assessment upon all property. Cooley
" Constitutional Lim., p. 2, and cases cited. It is this which
" distinguishes taxation from arbitrary exaction. 2 Dillon
" Mun. Corp'n, Sec. 736."

U. S. vs. Riley, 5 Blatch., 204, Shipman, *J.*, at p. 209.

" Tax Laws, both State and National, are required to be
" uniform. This is an elementary principle of legislation,
" resting upon the solid foundation of justice."

It has been frequently asserted that the uniformity contemplated by the framers of the Constitution was merely geographical, as between the different States of the Union.

In Edye vs. Robertson, 112 U. S, 580, at page 594, Mr. Justice Miller writes:

" The uniformity here prescribed has reference to the va-
" rious localities in which the tax is intended to operate. ' It
" ' shall be uniform throughout the United States.' Is the
" tax on tobacco void because in many of the States no tobacco

"is raised or manufactured? Is the tax on distilled spirits
"void, because a few States pay three-fourths of the revenue
"arising from it?"

To the same effect, Lectures on the Constitution (N. Y., 1891), at page 239. Exactly what Mr. Justice Miller means by this language is made clear in the passage immediately following.

At page 240:

"They are not required to be uniform as between the differ-
"ent articles that are taxed, but uniform as between the
"different places and different states. • • • *The tax must*
"*be uniform on the particular article; and it is uniform*
"*within the meaning of the constitutional requirement if it is*
"*made to bear the same percentage over all the United States.*"

At page 241, referring to similar provisions, which have been adopted in some of the State Constitutions, he says that the practical construction, which has been given these provisions of the State Constitution, is to allow classification of different articles for purposes of taxation, and that the provision of the State Constitutions is satisfied, "provided the *rate* is uniform on the same class "everywhere with all people and at all times." But this is, in effect, the construction which he has given to the like provision of the United States Constitution.

The power of classification for purposes of taxation, either in Congress or in the State Legislatures, is not questioned, but we respectfully insist, independently of and without reference to the provisions, either of State or United States Constitutions, that, whenever a reasonable and proper classification has been made, the *rate* of tax upon the property of persons included within that class must be equal and uniform, proportioned to the amount of property taxed.

It is clear that Mr. Justice Miller in the passages above quoted had in contemplation a fixed and equal *rate* of tax upon the same class of taxable objects proportioned to the number or quantity of such taxable objects. The *rate* being the same for the same class *in every part of the United States*, the statutes imposing the taxes were not obnoxious to the constitutional objection that the taxes imposed lacked uniformity.

The language employed by Mr. Justice Miller does not warrant the conclusion that a tax inherently and essentially unequal in its

operation, does not violate the constitutional requirement in question, provided the same inequalities be maintained in all of the States of the United States. Such contention has no support either in reason or authority.

The tax is only "uniform" when it operates with the "*same* "*force and effect* in every place where the subject is found."

The United States government, within the limitations of its constitutional powers is a unit, one general government, exactly as the respective State governments are units in respect of the powers reserved to themselves, and when the United States Constitution provides that a tax shall be uniform "throughout the United States," it is difficult to understand why the words should receive a different interpretation in relation to the territory constituting the United States, than the words "throughout the State," as used in State Constitutions, receive in the interpretation of State Constitutions, in relation to the territory constituting the respective States.

Why may it not be argued with equal reason that a provision in a State Constitution that a tax shall be "uniform" throughout the State simply relates to the geographical divisions of the State into counties and townships, and that the uniformity exacted by the State Constitution only requires that taxes shall be uniform as between counties or townships, and that any lack of uniformity in the imposition of a tax in any one county or township would be entirely proper, provided the same inequality were maintained throughout all other counties or townships of the State.

Chief Justice Bartley in Exchange Bank of Columbus vs. Hines, 3 Ohio St., 1, at page 15, defines "uniform" thus:

> "'*taxing*' is required to be 'by a uniform rule,' that is, by "one and the same unvarying standard. Taxing by a uniform "rule requires uniformity, not only in the *rate* of taxation, but "also uniformity in the *mode* of the assessment upon the tax-"able valuation. *Uniformity in taxing implies equality in* "*the burden of taxation*; and this equality of burden cannot "exist without uniformity in the mode of the assessment as "well as in the rate of taxation."

b. *Irrespective and independently of the provision of the Constitution, all taxes must be as nearly uniform or equal as may be on the same class of property.*

While, as has been stated by this Court, perfect and absolute equality is a "baseless dream," still the fact that absolute equality in the imposition of taxes can never be attained, does not excuse either Congress or the State Legislatures from approximating, as nearly as may be, to the inherent and fundamental principle of equality in all taxation, and no law, whether of the general government or of the State governments which fails to tax the same class of property at the same *rate* will stand. This rule is well stated by Mr. Attorney General Olney in the Income Tax cases:

> "So far as the validity of this Income Tax Law or any "other tax law is concerned, the word 'uniform' might as "well be out of the Constitution as in it. The word is sur- "plusage. It simply designates and describes an essential "element of every tax—an element which is inherent in every "valid tax, and the absence of which would be sufficient to "annul attempted exercise of the taxing power." * * *
>
> "Theoretically a tax for the benefit of the public should fall "equally upon all persons composing the public; should, as "text-writers and judges often express it, *be ratable and pro- "portional*, and be so adjusted that every member of the com- "munity shall contribute his just and equal share toward the "common defense and the general welfare." * * *
>
> "Hence, in taxing this class or exempting that, Congress "must proceed upon considerations of public policy, and can- "not adopt a classification which has no relation to the end "to be attained, and is founded only in whim or caprice."

Cooley's Constitutional Limitations, 6th Edition, page 598:

> "Everything that may be done under the name of taxation "is not necessarily a tax; and it may happen that an oppres- "sive burden imposed by the government, when it comes to be "carefully scrutinized, will prove, instead of a tax, to be an "unlawful confiscation of property, unwarranted by any prin- "ciple of constitutional government."

Page 607:

> "*It is of the very essence of taxation that it be levied with "equality and uniformity*, and to this end, that there should "be some system of apportionment. Where the burden is "common there should be common contribution to discharge "it. Taxation is the equivalent for the protection which the

"government affords to the personal property of its citizens; "and as all alike are protected, so all alike should bear the "burden in proportion to the interests secured. Taxes by the "poll are justly regarded as odious and are seldom resorted to "for the collection of revenue; *and when taxes are levied upon* "*property, there must be a proviso with reference to a uniform* "*standard, or they degenerate into a mere arbitrary exaction.* "In this particular the State Constitutions have been very "specific, *though in providing for egality and uniformity they* "*have done little more than to state in concise language a prin-* "*ciple of constitutional law which, whether declared or not,* "*would inhere in the power to tax.*"

It has been held by this Court that a classification for purposes of taxation is proper which constitutes railroad corporations a separate class (Kentucky Railroad Tax Cases, 115 U. S., 321.) This authority does not, however, justify a gross discrimination between members of the same class of natural persons or corporations by varying the *rate* of the tax against different members of the same class, according to the *amount* of taxable property held by them, increasing the *rate* with the increase in *amount* of taxable property This is exactly what is attempted to be accomplished by the act of Congress in question.

This mode of classification was condemned by Mr. Justice Harlan in his dissenting opinion in the Income Tax Case, in the following language, 158 U. S., at page 674:

"If it were true that this legislation, in its important as- "pects, and in its essence, *discriminated against the rich* "*because of their wealth*, the Court, in vindication of the "equality of all before the law, might well declare that the "statute was not an exercise of the power of *taxation*, but "was repugnant to those principles of natural right upon "which our free institutions rest, and, therefore, was legisla- "tive spoliation, under the guise of taxation."

Increasing the *rate* of taxation with the increase of the *amount* of property taxed, is in no wise different from valuing the property of different members of the same taxable class for purposes of taxation upon a different basis.

It is true that it is entirely competent for Congress to classify imported articles, both in respect of differences in the *kind* of

articles imported, and in respect of differences in value and quality of like articles, as in Arthur's Executors vs. Vietor, 127 U. S., 572; Hedden vs. Robertson, 151 U. S., 520; Arthur vs. Morgan, 112 U. S., 495-8.

But, on the other hand, is it within the constitutional power of Congress to classify the same articles of import, of equal value and quality, and establish a *rate* of duty according to the *quantity* of such article which may be imported?

c. *The provisions of the XIVth amendment to the Constitution of the United States that "no State shall deny to any person within "its jurisdiction the equal protection of the laws" has been frequently invoked in this Court by persons complaining that they have been denied equal rights with other members of the State community in respect to taxation.*

In most of these cases the relief sought has been denied by this Court.

Many of them are cited and discussed in the opinion of Mr. Justice McKenna in

Magoun vs. Ill. Trust and Savings Bank, 170 U. S., 283.

The reason usually assigned by the Court for its determination has been that the classification for purposes of taxation established by the State statutes under discussion, "is one based upon some "reasonable ground—some difference which bears a just and proper "relation to the attempted classification—and it is not a mere arbi- "trary selection."

Gulf, Col. & Santa Fe Ry. Co. vs. Ellis, 165 U. S., 150.

or, that there has been no "unjust discrimination against any per- "son or corporation" as in

Bells Gap R. R. Co. vs. Pennsylvania, 134 U. S., 232.

at the same time holding (p. 237) that "*clear and hostile discrimin- "ations against particular persons and classes, especially such as are "of an unusual character, unknown to the practice of our govern- "ments, might be obnoxious to the constitutional prohibition.*"

In Giazza vs. Tiernan, 148 U. S., 657,

the validity of a State statute of Texas was drawn in question. Plaintiff in error was indicted upon the charge of having pursued

the occupation of selling spirituous liquors in quantities less than one quart without first having obtained a license therefor. He was tried, convicted and fined $450. It was contended in his behalf that the statute was in violation of the XIVth Amendment of the Constitution. At page 662 Mr. Chief Justice Fuller writes:

> " Nor in respect of taxation was the amendment intended " to compel the State to adopt an iron rule of equality; to " prevent the classification of property for taxation at differ- " ent rates; or to prohibit legislation in that regard, especial- " ly either in the extent to which it operates, or the objects " sought to be obtained by it. *It is enough that there is no " discrimination in favor of one as against another of the same " class,*" citing Bells Gap case.
>
> " * * * This statute affects all persons in Texas en- " gaged in the sale of liquors *in exactly the same manner and " degree.*"

There is another class of cases in which relief has been denied to corporations from alleged unequal taxation, upon the ground that, corporations being the creatures of State statutes, and having the right to exist only by permission of the States under whose laws they were organized, it was entirely competent for the States to impose such terms as a condition of their existence *at all* as to the State Legislatures might seem proper. As in

Home Ins. Co. vs. People, 134 U. S., 594.

In that case the constitutionality of the New York franchise tax was before the Court. It was contended that the tax violated the provision of the constitution in question, in that the tax assessed was unequal because being assessed upon dividends, the *rate* of tax was unequal whenever dividends amounted to less than six per cent. All dividends in excess of six (6) per cent. were taxed at the same rate, namely: ¼ mill per cent. upon the capital stock for each one per cent. of the dividends. Where the dividends were less than six (6) per cent. the amount of capital stock was made the basis of the franchise tax and not the dividends. It was held, Mr. Justice Field, writing for the Court, that the term " corporate franchise or business," as used in the act, meant the right or privilege given by the State to two or more persons to be a corporation and do business.

At page 600

"The granting of such right or privilege rests entirely in "the discretion of the State and of course, when granted, may "be accompanied with such conditions as its Legislature may "judge most befitting to its interests and policy. * * * No "constitutional objection lies in the way of a legislative body "prescribing any mode of measurement to determine the "amount, it will charge for the privileges it bestows. "(p. 606). Nor is the objection tenable that the statute, in "imposing such tax, conflicts with the last clause of the first "section of the XIVth Amendment of the Constitution of "the United States. * * * The amendment does not pre- "vent the classification of property for taxation—subjecting "one kind of property to one rate of taxation and another "kind of property to a different rate—distinguishing between "franchises, licenses and privileges, and visible and tangible "property, and between real and personal property. Nor does "the amendment prohibit special legislation. * * * and "when such legislation applies to artificial bodies, *it is not* "*open to objection if all such bodies are treated alike under* "*similar circumstances and conditions*, in respect to the pri- "vileges conferred upon them and the liabilities to which they "are subjected."

There is still another class of cases relating to the subject of state taxes on inheritances.

Major vs. Grima, 49 U. S. (8 How.), 490.
Frederickson vs. Louisiana, 64 U. S. (23 How.), 445.
Magoun vs. Ill. Trust and Savings Bank, 170 U. S., 283.
United States vs. Perkins, 163 U. S., 625.

In Major vs. Grima (49 U. S. 8 How., 490), the question arose as to the constitutionality of the law of the State of Louisiana, under which every person not being domiciliated in that state and not being a citizen of any state or territory in the Union, who shall be entitled, whether as heir, legatee or donee to the whole or any part of the succession of any person deceased, shall pay a tax of ten per cent. of the value thereof. Mr. Chief Justice Taney at pp. 493–4 writes:

"Now the law in question is nothing more than an exercise "of the power which every state and sovereignty possesses, of "regulating the manner and terms upon which property, real "or personal, within its dominion may be transmitted by last "will and testament or by inheritance and of prescribing who "shall and who shall not be capable of taking it. Every state "or nation may unquestionably refuse to allow an alien to "take either real or personal property situated within its "limits, either as heir or legatee, and may, if it thinks proper, "direct that property so descending or bequeathed shall belong "to the state. In many of the states of the Union at this day "real property devised to an alien is liable to escheat. And "if a state may deny the privilege altogether it follows that, "when it grants it, it may annex to the grant any conditions "which it supposes to be required by its interests or policy. "This has been done by Louisiana. The right to take is "given to the alien subject to a deduction of ten per cent. for "the use of the State.

"In some of the States, laws have been passed at different "times imposing a tax similar to the one now in question upon "its own citizens as well as foreigners; and the constitution- "ality of these laws has never been questioned. And if a "State may impose it upon its own citizens, it will hardly be "contended that aliens are entitled to exemption, and that "their property in our own country is not liable to the same "burdens that may lawfully be imposed upon that of our "citizens."

So, in Frederickson vs. State of Louisiana, 64 U. S. (23 How.), 445, the same statute came up for construction before this Court. It was contended that the provisions of the statute were in violation of the terms of the Convention between the United States and the King of Wurtemburg. The decision of the question at issue in that case rested upon the fact that the treaty did not go into effect until after the right of inheritance had become vested.

Mr. Justice Campbell, in his opinion, writes (p. 447):

"This Court, in Major vs. Grima, 8 How., S. C. R., 490, de- "cided that the act of the Legislature of Louisiana was noth- "ing more than the exercise of the power which every State "or sovereignty possesses, of regulating the manner and terms

" upon which property, real and personal, within its dominion
" may be transmitted by last will and testament, or by inherit-
" ance, and of prescribing who shall and who shall not be
" capable of taking it."

In Magoun vs. Illinois Trust & Savings Bank, 170 U. S., 283, the construction of the Inheritance Tax of the state of Illinois came before the court. By the Illinois act a tax was imposed upon the right to inherit from a deceased person. The act exempted, to the amount of $20,000, legacies and distributive shares of widows, husbands, fathers, mothers, descendants, brothers, sisters, children-in-law and adopted children, and taxed the excess over $20,000 passing to members of these classes at $1 per $100.

Legacies and distributive shares passing to uncles, aunts, nieces, nephews and their descendants exempted $2,000 and taxed the excess at $2 per $100. In all other cases a tax on all legacies and distributive shares of $10,000 and less was assessed at $3 per $100; on all over $10,000, not exceeding $20,000, $4 per $100; on all over $20,000 and not exceeding $50,000, $5 per $100, and and on all over $50,000, $6 per $100. Legacies and distributive shares of less than $500 were exempted.

It was contended that the tax provisions of this law were in violation of the provisions of the clause of the XIVth Amendment of the United States Constitution prohibiting a state denying to any citizen the equal protection of the laws. The opinion of the majority of this court was written by Mr. Justice McKenna. Its determination was, that the law of the State of Illinois did not violate the provision of the United States Constitution referred to. It was stated in the prevailing opinion that the right to dispose of property by will or to inherit property of persons dying intestate was an affirmative right granted by the state and that it was entirely competent for the State to restrict the right of inheritance in such manner or to impose such conditions thereon as the State Legislature deemed proper. In this view of the exclusive power of States to regulate and determine the right of inheritance, either in cases of intestacy or under a will, it was held that no obligation was cast by the United States Constitution upon State Legislatures to impose a tax upon the right of inheritance, which should be absolutely equal and uniform in all cases, and that it was proper for State Legislatures to create classes for the purposes of a *State succession tax*, based upon the amounts of legacies or inheritances received.

In none of the State Statutes considered in the above cited cases, except in the Magoun case, is found the one objectionable feature, which exists in the United States enactment now before the Court, a provision which arbitrarily varies the *rate* of taxation of the *same kinds and classes of property and against the members of the same class of taxable persons*, on account of the *amount* of such property which it is sought to tax. The clear inference to be drawn from the opinions in the cases cited is, that a State statute, imposing any ordinary tax upon property, which should seek to discriminate against large holders of the same kind of taxable property and to assess them *at a higher rate*, solely on account of their increased holdings, would be objectionable under the XIVth Amendment of the Constitution. The *classification of property* for taxation, which subjects *one kind of property* to one rate and *another kind of property* to a different rate is not objectionable, but suppose a State statute, imposing a tax other than an inheritance or franchise tax, undertook to subject the *same kind of property* in the hands of *the same class of taxable persons* to different *rates* of taxation, would not such a State statute be unconstitutional and in violation of the provision of the XIVth Amendment?

As stated in the dissenting opinion of Mr. Justice Brewer, in the Magoun case (p. 302):

> "*It seems to be conceded that if this were a tax upon prop-*
> "*erty such increase in the rate of taxation could not be sus-*
> "*tained*, but being a tax upon succession, it is held that a dif-
> "ferent rule prevails. The argument is that because the State
> "may regulate inheritances, and the extent of testamentary
> "disposition, it may impose thereon any burdens, including
> "therein taxes, and impose them in any manner it chooses."

It will hardly be contended that Congress has any power whatsoever in the matter of the regulation of the succession of individuals to the property of deceased persons. That power rests exclusively with the States, and whatever their policy in this regard may be, it must be accepted by the United States Government for all purposes. The United States Government may not impose any conditions or limitations whatsoever upon the right of individuals to succeed to the property of deceased persons. While it may be competent for the State to impose taxes lacking equality

and uniformity, upon legacies and distributive shares, as a condition to the succession, it is not within the constitutional power of the United States to exact any such condition.

The right of individuals to inherit, as determined by the respective state legislatures, must be accepted by the General government as a fixed and accomplished fact outside of and beyond its power to influence or control by legislation, and so far as it is concerned, the rights of individuals under State statutes to inherit is as absolute and fixed a property right as was the right of their respective decedents to hold and own their property during their lives.

Therefore, the theory that the United States are taxing, not the property which passes to the respective next of kin or legatees, but the right to succeed to the property is absolutely erroneous, and the reasons stated by Mr. Justice McKenna for the conclusion reached by the Court in the Magoun case have absolutely no bearing upon or relation to the question now before the Court.

The general government is without constitutional power to impose its tax as a *condition* of inheritance. It taxes the property inherited, not the right to succeed to the property. In either case the tax must be "uniform throughout the United States."

What is the classification sought to be established by the Act of Congress in question for purposes of taxation? Under one interpretation of the act, the amount of the personal estate of the decedent. Under another possible interpretation, the amounts of the respective legacies or distributive shares.

Under either construction it is a tax, the *rate* of which depends upon the *amount* of property taxed.

In its final analysis, this Court, to sustain this act of Congress, must decide that this is a proper classification for purposes of taxation, and that the *rate* of tax may vary with the *amount* of taxable property in the hands of the same class of taxable persons.

d. *Scholey, vs. Rew*, 90 *U. S. Supreme Court, Reports*, 23 *Wall*, 331,

construed the former succession tax of 1864. ***As the provisions of that act materially differ from those of the act now under consideration, Scholey vs. Rew is not an authority in point.***

It was provided by the act of 1864 that there should be paid to the United States in respect of every legacy or distributive share arising from personal property, a duty or tax of one per cent.,

where the persons entitled were the lineal issue, lineal ancestors, brother or sister of the deceased person; at the rate of two per cent. where such persons were descendants of a brother or sister of the deceased person; at the rate of four per cent. where such persons were a brother or sister of the father or mother or the descendant of a brother of the father or mother of the deceased person, and at the rate of five per cent. where such persons were a brother or sister of the grandfather or grandmother, or a descendant of the brother or sister of the grandfather or grandmother of the deceased person, and at the rate of six per cent. where such persons were in any other degree of collateral consanguinity or a stranger in blood or a corporation. The act entirely exempted legacies and distributive shares passing to a husband or wife of the deceased person, and also exempted those passing to a minor child where the legacy or distributive share was less than $1,000, and in the latter case, the excess over $1,000 was taxable.

It will be observed that the classifications here established were based upon the degree of relationship or the fact of the non-existence of any relationship whatsoever, and no attempt was made to create classes based upon the *amounts* received, or the *amounts* of the estates from which the legacies or distributive shares were paid, as is attempted in the present act.

No contention was made in the Rew case that the provisions of the act of 1864 were subject to the objection that the tax lacked uniformity and equality. The only question considered by the Court was whether or not the tax was a direct tax.

c. *Even if the uniformity specified in the clause of the Constitution in question be held to be a mere geographical uniformity, nevertheless the tax in question constitutes a violation of that rule of uniformity.*

A tax to be uniform geographically, as between the States, must be an equal tax in each of the different States upon the same kind of taxable property of the same class of taxable persons, that is to say, the *rate* of tax must be *proportional* to the *amount* of property taxed in every State. If this be a correct definition of geographical uniformity, the tax in question is not even geographically uniform. Let us assume, for example, that every person who has died in New York State since this act went into effect, was possessed of personal property of the value of upwards of one million dollars, and that every person who has died in the State of West Virginia was possessed of personal property of the value of more

than ten thousand dollars, and less than twenty-five thousand dollars, and that, in both instances, the entire property passed to children of the deceased person. We thus have in New York State a *rate* of tax upon property passing to children of 2¼ per cent., and in West Virginia a *rate* of tax upon property passing to the same class, children, of three-quarters of one per cent. So in New York State, the *rate* of tax upon property passing to persons bearing no relation to the deceased person or to corporations would be fifteen per cent., while in West Virginia it would be five per cent regardless of the amount of the legacies passing to such individuals or corporations.

While the above assumption is undoubtedly unwarranted by the facts, it is, nevertheless, approximately correct. Certainly, the number of estates in New York, of which the personal property exceeds in value $25,000, greatly exceeds the number of such estates in West Virginia, and, to that extent, the *rate* of taxation of legatees and distributees in New York exceeds the *rate* of taxation of the same class of legatees and distributees in West Virginia.

f. *No act of Congress has ever before attempted to create classes for purposes of taxation, based upon the amounts of taxable property held or received, with varying rates of taxation, the rate increasing as the amount increases.*

> Such an attempt constitutes "in its essence" a discrimination "against the rich because of their wealth," and this Court should "in vindication of the equality of all before the "law * * * declare that the statute was not an exercise "of the power of *taxation*, but was repugnant to those princi- "ples of natural right upon which our free institutions rest, "and, therefore, was legislative spoliation, under the guise of "taxation." Mr. Justice Harlan, Income Tax Case, 158 U. S., 674.

g. *Analysis of Section 29 of the War Revenue Law and application of the foregoing principles to its provisions.*

> The Section provides that "any * * * persons having "in charge * * * as * * * Executors * * * any "legacies * * * arising from personal property, where "the whole amount of such personal property as aforesaid "shall exceed the sum of ten thousand dollars in actual value,

" passing * * * from any person possessed of such prop-
" erty * * * by will * * * to any person or persons, or
" to any body or bodies, politic or corporate, * * * shall
" be, and hereby are, made subject to a duty or tax * * * as
" follows—that is to say: Where the whole amount of said per-
" sonal property shall exceed in value ten thousand and shall
" not exceed in value the sum of twenty-five thousand dollars,
" the tax shall be"

First—Where the persons entitled shall be the lineal issue or lineal ancestors, brother or sister to the deceased person, 75 cents for each one hundred dollars of the clear value of such interest.

Second—Where the persons entitled shall be the descendant of a brother or sister of the decedent, at the rate of $1.50 for each one hundred dollars.

Third—Where the persons entitled shall be a brother or sister of the father or mother or a descendant of a brother or sister of the father or mother of the decedent at the rate of $3 for each one hundred dollars.

Fourth—Where the persons entitled shall be a brother or sister of the grandfather or grandmother of the decedent, or descendants, etc., at the rate of $4 for each one hundred dollars.

Fifth—Where the persons entitled shall be in any other degree of relationship or a stranger in blood to the decedent, or a corporation, at the rate of $5 for each one hundred dollars.

" Provided, that all legacies or property passing by will or by the
" laws of any State or Territory to husband or wife of the person
" died possessed as aforesaid, shall be exempt from tax or duty.

" Where the amount or value of said property shall exceed the
" sum of twenty-five thousand dollars, but shall not exceed the sum
" or value of one hundred thousand dollars, the rates of duty or tax
" above set forth shall be multiplied by one and one-half; and
" where the amount or value of said property shall exceed the
" sum of one hundred thousand, but shall not exceed the sum of
" five hundred thousand dollars, such rates of duty shall be multi-
" plied by two; and where the amount or value of said property
" shall exceed the sum of five hundred thousand dollars, but shall
" not exceed the sum of one million dollars, such rates of duty
" shall be multiplied by two and one-half; and where the amount
" or value of said property shall exceed the sum of one million
" dollars, such rates of duty shall be multiplied by three."

It has been held by the Commissioner of Internal Revenue that the words "said property" in the clause of Section 29, which provides for the increase of the *rate* of tax, with the increase of the "amount or value of *said property*," refer to the whole amount of personal property of the decedent passing to legatees and distributees, and not to the amounts of the respective legacies and distributive shares. This is probably the correct interpretation of the language employed.

For the purposes of this discussion it is immaterial, which view is adopted.

First—As to the lineal issue, lineal ancestors, brothers and sisters. The inheritance of each is taxed thus.

If the "said property" is valued at more then $10,000 and not more than $25,000, the *rate* of tax is $\frac{3}{4}$ per cent.

If more than $25,000 and no more than $100,000, the *rate* of tax is $1\frac{1}{8}$ per cent.

If more than $100,000 and not more than $500,000, the *rate* of tax is $1\frac{1}{2}$ per cent.

If more than $500,000 and not more than $1,000,000, the *rate* of tax is $1\frac{7}{8}$ per cent.

If more than $1,000,000, the *rate* of tax is $2\frac{1}{4}$ per cent.

Second—As to collaterals, non-relatives and corporations, mentioned in the "Fifth" subdivision, the respective *rates* of tax, according to *amounts*, are: 5 per cent., $7\frac{1}{2}$ per cent., 10 per cent., $12\frac{1}{2}$ per cent., 15 per cent.

Testator "A" dies possessed of personal property of the net value of $12,000 and bequeaths it in equal shares to four children, each of whom receives $3,000, for which he is taxed $\frac{3}{4}$ per cent.

Testator "B" leaves personal property of the net value of $9,000 and bequeaths it to one child, who receives $9,000, but is not taxed.

Testator "C" leaves $27,000 equally to three children, $9,000 each. Tax, $1\frac{1}{8}$ per cent.

Testator "D" leaves $1,100,000 and bequeaths to one child $9,000. Tax, $2\frac{1}{4}$ per cent.

Testator "E" leaves $9,000, bequeaths to his church $5,000. No tax.

Testator "F" leaves $15,000, bequeaths to his church $5,000. Tax 5 per cent., $250.

Testator "G" leaves $2,000,000, bequeaths to his church $5,000. Tax 15 per cent., $750 (as in the case at bar).

Testator "H" leaves personal property, $9,000; real property, $2,000,000, bequeaths to his church, $9,000. No tax.

Testator "J" leaves $2,000,000, bequeaths to his brother $100,000. Tax 2¼ per cent., $2,250 (as in the case at bar).

Testator "K" leaves $400,000, bequeaths to his brother $100,000. Tax 1½ per cent., $1,500.

Thus, under the construction of the statute adopted by the Commissioner of Internal Revenue, we have an attempted classification, based neither upon degree of relationship, nor amounts received, but upon *the source from which the property taxed is derived.*

This would seem to be "a classification which has no relation to the end to be attained, and * * * founded only in whim or caprice."

Argument of Attorney General Olney in Income Tax Cases.

But assume, for purposes of argument, that Congress by the words "said property" intended to designate the amounts of the respective legacies or distributive shares passing from the decedents.

The classification then becomes: (1) Children, etc., (2) nephews and nieces, etc., (3) uncles and aunts, etc., (4) great uncles and aunts, etc., (5) other collaterals, etc.

Such a classification would be entirely proper, if the law were not otherwise unconstitutional, and if the classification ended here.

But each of the above classes is again sub-classified according to the *amounts* received, and a *rate* of tax imposed against each member of the sub-class, according to the *amount* received by him. The *rate* of tax increases as the *amount* of the legacy or distributive share increases.

For example:

A child receives a legacy of $9,000 and is not taxed.
He receives a legacy of $11,000 and is taxed ¾ per cent.
He receives a legacy of $26,000 and is taxed 1⅛ per cent.
He receives a legacy of $101,000 and is taxed 1½ per cent.
He receives a legacy of $501,000 and is taxed 1⅞ per cen

He receives a legacy of $1,700,000 and is taxed 2½ per cent. (as in the case at bar).

In other words the law makes a clear discrimination against the rich, and exacts from them a greater *proportional* contribution to the needs of the government.

There is not a case which I have been able to find in the books which has not unqualifiedly condemned such a discrimination as constituting legislative spoliation and confiscation, and not taxation.

The cases above considered, in which State legislatures have imposed unequal taxation as a condition to the enjoyment of a right or privilege affirmatively granted by it, as in the case of State taxes upon successions and franchises, have no bearing upon the question now before the Court.

In those cases the State statutes were sustained, not as constituting a proper exercise of the taxing power, but as a lawful imposition of a condition to the enjoyment of a right or privilege conferred, which rested within the exclusive power of the State to grant.

The general government possesses no such power in respect of successions to the property of deceased persons. It is powerless to exact the payments specified as a condition to the enjoyment of the right of succession, as the exclusive control of this subject, rests with the respective State governments.

Therefore, the Act of Congress in question can only be considered as an Act for the imposition of taxes, which, if indirect, as we have assumed for the purposes of this argument, must be "uniform throughout the United States." We most respectfully submit that an indirect tax, which clearly discriminates against the holders of large amounts of property and taxes them at a higher *rate* than the holders of smaller amounts, is not a uniform tax within the intention of the framers of the United States Constitution, nor an equal tax within the inherent and fundamental principles of all taxation, as distinguished from arbitrary confiscation.

CHAS. H. OTIS,
Attorney for Plaintiffs in Error.

JOHN G. CARLISLE,
Of Counsel.

No. 387.

Brief of Peckham for P. E.

Filed Dec 2, 1899.

United States Supreme Court.

EBEN J. KNOWLTON, *et al.*, Executors, &c.,
Plaintiffs in Error,

against

FRANK R. MOORE, U. S. Collector of Internal Revenue of 1st District of New York,
Defendant in Error.

Additional Brief for Plaintiff in Error.

WHEELER H. PECKHAM,
Of Counsel for Plaintiff in Error.

U. S. Supreme Court.

EBEN J. KNOWLTON, *et al.*, Executors, &c.,
Plaintiffs in Error,

against

FRANK R. MOORE, U. S. Collector of Internal Revenue of 1st District of New York,
Defendant in Error.

Error to the Circuit Court of the United States for the Eastern District of New York.

STATEMENT.

The plaintiffs in error, and also plaintiffs below, as executors of Edwin F. Knowlton, deceased, pursuant to § 30 of the War Revenue Act of 1898, filed with the Collector, the statement thereby required, and thereupon, under due protest, paid the succession tax assessed, and after due proceedings brought this suit to recover the tax so paid.

The defendant demurred to the complaint. The Circuit Court sustained the demurrer, and gave judgment for the defendant, and plaintiffs sued out this writ of error to this Court.

The sole question is the constitutionality of §§ 29 and 30 of the War Revenue Act of 1898.

The undersigned has been retained in this case but very recently, and at the request of a client having an extremely large interest in the question.

He found elaborate and exhaustive briefs already prepared by other counsel.

These briefs surely cover the whole field of discussion, so far as it is founded on history and authority, and it has therefore seemed not only unnecessary but unwise to repeat what has been so fully and completely done.

The briefs seem also to cover every possible line of argument, and the views the undersigned submits are rather by way of emphasizing the arguments which have struck him as particularly forcible than as contributing anything new to aid in the solution of the problem.

POINTS.

First.—The tax is direct. Every tax that can possibly be laid by any government is a tax on some person or persons, and there is no such thing as a tax on property, or privilege or right, independently of the person owning it.

A moment's reflection of course shows that this is a truism.

Property, *i. e.*, anything other than men, has no rights or obligations. If in *form* a thing is taxed it means that some man or men having certain relations to that thing are taxed.

It is like a judicial proceeding *in rem*, as it is called.

Strictly speaking, there is no such thing as a judicial proceeding *in rem*, but it is a convenient way of speaking of those judicial proceedings where the object is to have the Courts adjudge the rights of all men as to a particular thing and where notice or summons is given to all men by seizure of the "*res*" and by due publication.

What is adjudged however is not any right or obligation of the "*res*," for that is unthinkable, but the rights and obligations of all men in respect to the "*res*."

Precisely the same in respect to a tax.

What is taxed is the right of some person in the *res*.

If there is anything which no one owns it cannot be taxed, and if any person is taxed in respect to things which he does not own or which no one owns (*e. g. ferœ naturæ*) it becomes a capitation tax and thus again is a tax on persons.

2d. Every tax in a certain sense is a direct tax and *prima facie* every tax is in the legal sense a direct tax.

Every tax must be paid to the government by some person. The person who pays it is, as between him and the government, taxed directly. As to him it is a direct tax.

If no one voluntarily pays the tax, then the tax is enforced against some property.

The person against whose property it is enforced is, as between him and the government, taxed directly. As to him it is a direct tax.

With such payment or with such collection all interest of the government in the tax ceases.

Whether the person paying or suffering collection from his property can in any way recoup himself, from others, the amount of the tax, does not concern the government. Whether he can or cannot no portion of the tax will be returned.

3d. The idea of indirect taxes was conceived by the political economists who were discussing, not ways and means of government, but the ultimate incidence of taxes actually levied.

No one ever claimed that as between government and taxpayer all taxes were not direct.

To the man who imports goods and pays the duty the tax is direct. He may or may not be able to "shift" it, but absolutely as between him and the government the tax, like every other tax, is direct.

The political economists however showed that at least to a large extent the persons who directly paid certain taxes were able to "shift" the burden of such taxes upon the persons who ultimately consumed the goods in respect to which such persons had been taxed; and the phrase "indirect taxes" or "indirect taxation" became the language in which was expressed the thought or idea that a tax was of the character that the person on whom it was directly imposed and as to whom it was a direct tax could, at least to a large degree, shift its burden on others who should become the consumers.

4th. To the extent to which this doctrine

of the political economists was palpably true and became generally accepted the idea of indirect taxes or taxation became a legal and political as well as a philosophical idea.

Statesmen gave it attention in its political relations and the Courts gave it attention in constitutional and legal relations and provisions respecting it were embodied in our constitution.

Up to the time of the adoption of our constitution and even to-day the only kind or classification of taxes as to which governments in their political capacity and courts in their judicial capacity hold that the person directly taxed can "shift" the burden are "duties, imposts and excises."

Now, the words "duties" and "imposts" are synonymous and refer to the tax on imported goods. The word "excise" refers to an inland tax of the same nature as the duties but levied on commodities made or manufactured inland, *i. e.*, in the country.

6th. *Prima facie* therefore a tax is and must be regarded as direct and unless it falls within the *well-recognized* class of indirect taxes known as duties or excises, the burden is on him, who claims it, to show that it is not direct.

7th. The tax involved in this case is plainly not a "duty or impost" and plainly not an "excise."

The reason of the economists for calling these taxes indirect is that the person on whom they were first levied could "shift" them and that in the price the consumer

would ultimately pay the tax, and also that the consumer having the option to purchase or not, if he did so became a voluntary taxpayer.

The reason applies to duties and to excises. The importer or dealer who first pays must be able to "shift" the tax by adding it to the price, and the person on whom as consumer it is shifted must voluntarily assume it by becoming the purchaser.

Unless both these elements are present a tax can be neither a duty nor an excise, but is simply a direct tax.

For this reason Madison condemned the carriage tax decision.

A tax on manufacturers of or dealers in carriages would clearly be an excise, because if not so large as to destroy the business it would be added to the price, and purchase by anyone would be optional.

But a tax on carriages in the hands of and in use by a consumer is not an excise. The tax cannot be shifted and payment of the tax is not voluntary.

A tax on a brewer is an excise because it can be and is shifted and the purchase and consumption by the purchaser are voluntary; but a tax which omits and passes by the brewer and is levied on the man who owns it for consumption is not an excise. No one pretends that he can shift it—no one pretends that payment of such a tax is in any degree voluntary.

It is a direct tax from which he cannot escape.

Of course, in a certain sense all direct and most indirect taxes may be avoided by

any one who chooses to divest himself of all property. Such possibility, however, does not constitute the voluntary assumption of a tax, by the purchase of a taxed commodity, referred to either by the economists or the law.

Both with the economists and with the law that, and that alone, is an excise tax, the burden of which can be "shifted," and which, when assumed, is voluntarily assumed by the consumer. If either of these elements is absent the tax is direct.

8th. Both of these elements are wanting in the law of 1898.

The law, § 29, in so many words taxes the persons who "as administrators, executors and trustees have in charge any legacies or distributive shares," &c.

So far this is clearly a direct tax on the administrators, &c., in respect to the property and on the beneficiaries for whom such property is held.

Omitting the administrators, etc., who hold only in trust, the tax is substantially on the beneficiaries in respect to the property devised or inherited.

Can the burden of this tax be shifted? If we turn to the political or legal aspect of the question we look in vain for any law, practise or adjudication in any way suggesting an affirmative answer.

If we turn to the discussions of the economists our efforts to find a suggestion of an affirmative answer are equally vain.

Seligman in "Incidence of Taxation," p. 299, says, "A tax on inheritances or bequests cannot be shifted, for evidently there is no one to whom it could be trans-

ferred. The ulterior efforts of which some writers speak, such as the influence of inheritance taxes on the accumulation of capital do not really illustrate the process of shifting."

The reason why it cannot be transferred even if the bequest is of a stock of goods which the legatee can only use by selling on the market *e. g.* contents of a brewery, etc., etc., is that the tax can not possibly be added to the price.

Inheritance taxes are but occasional and upon a death. The cost to the producer of the great mass of the goods for sale on the market does not include an inheritance tax. Consequently when one who has paid an inheritance tax tries to sell his inherited goods he comes into competition with those who have paid no such tax, and he can get no higher price than do they who have paid no tax. The inheritance tax thus becomes a dead loss. It was direct and it cannot be shifted. No one who purchases will pay the tax in the price.

Nor is it of the least consequence in this discussion whether the tax be considered as assessed upon the right to inherit or take by will or on the property inherited or bequeathed.

In either case it is a direct tax on the person, administrator etc., or beneficiary, which cannot be shifted and in both cases the thing sold (the right to inherit or the thing inherited) cannot be sold at a price which shall include the tax.

9th. In making this argument we raise and rely upon no theories or speculations of economists or other philosophers.

On the contrary we submit that in the plain and ordinary use of terms as commonly understood by those interested in the subject, the words "duties, imposts and excises" have a meaning which excludes inheritance taxes whether levied on the property or on the right to take by inheritance or bequest, whether the distinction between them be or be not a distinction without a difference.

We say first that the economists never claimed that an inheritance tax could be shifted.

We say next that even if they had, such claim has never been accepted or acknowledged either in legislation or judicial judgments so as to give the slightest warrant for the inference that it could have been understood by the framers of the constitution to be included in the terms "duties, imposts and excess" and to be excluded from the terms "direct taxes."

This Court, after great discussion and exhaustive investigation has definitely held that the term "direct taxes" and "direct tax" are not limited to capitation and land taxes, but include such other taxes as are generally recognized as direct and which cannot be shifted, and has also held that it will not be controlled by the theories and speculations of economical philosophers.

And well may it have come to that conclusion, for surely, if it did otherwise, it would be no difficult undertaking to show that the burden of a land tax in many cases can be, and is, shifted on tenants and purchasers. Especially is this so in urban

and suburban lands, whose value comes from use other than agricultural.

But independently of the theoretical question, whether a land tax can or cannot be shifted, the fact is plain that at the time of the adoption of our constitution the doctrine that it could be shifted, had not been so accepted in political or judicial circles as to warrant the judicial inference that it was excluded from the term "direct taxes" or included in the terms "duties, imports and excises."

10th. Infinitely more emphatically is the inference a necessary one, that it was not intended to include in the term "excise" an inheritance tax which not only no legislation and no adjudication but no economist up to this time or since has ever claimed to possess the qualities of an excise tax in the possibility of being "shifted," or in the remotest chance that the purchaser would in the price pay the tax.

It has been suggested that wherever the purchase or ownership of a commodity is optional, a tax on such commodity falls under the classification of "excise." That in such case it is not only an "excise" but that it is not "direct."

The suggestion is true if the consumer pays the tax in the price; it is as clearly untrue if the tax is not paid in the price but is assessed and levied on the purchaser after the purchase.

In the one case the purchaser has the option. He can purchase or not.

In the other case he has no option. The tax is levied directly on him and as he is

the consumer and not a dealer it is clearly impossible that he should shift the tax on any one else.

11. If it be suggested that in the Hylton case the person taxed was the consumer we answer that that fact constituted the plain error of that case, and we further submit that that error could never have been committed and that the decision in that case and in the case of Scholey *vs.* Raw could never have been made by a Court not imbued with the idea that the direct tax referred to in the Constitution must be construed as confined to a capitation tax and a tax on land.

12. Had the discussion at that early day arisen over an inheritance tax, we submit that its character as direct would have been so plain that the prejudice or tendency of thought to define a direct tax as including none but a capitation tax and a tax on land would not have prevailed against it.

13. The one feature of an inheritance tax that it is levied only on the occasion of a death eliminates every possibility of its being other than a direct tax. Annual taxes, if uniform, affect all alike. No one going into the market as a seller can escape their effect.

An inheritance tax, however, affects but one or very few at a time.

All other sellers can fix their price, based on the cost of production, exclusive of any inheritance tax.

Such a tax does not and cannot affect cost of production; it affects only the individual taxed. He must sell at the mar-

ket price fixed without reference to the inheritance tax, which he must pay with no possibility of shifting it.

The inheritance tax has the same effect so far as shifting is concerned as would a tax on a single individual by name—leaving all others untaxed.

Such a tax would be direct and could by no possibility be shifted.

This inheritance tax has the same effect.

If we take the present average of life at say forty years; then once in forty years is the average frequency with which an inheritance tax could be levied on any property and as to a large proportion of property disposed of *inter vivos* it would not be even that.

That such a tax could be shifted is surely unthinkable either in philosophy or law.

14. We have stated many things in reference to what economists, legislation or adjudications have or have not done, and we have made no citations.

The omission is of purpose. We intend to make no statement either pro or con which will be challenged by any one. We will, however, give one reference, viz., Professor Seligman's book edition of 1899 on the "'Incidence of Taxation." We give this reference not as substantiating any theory but merely because the book is a history or collection of the ideas or thoughts of economists on taxation for some hundreds of years.

If views have been entertained which therein are not narrated, it is a fair inference that they have made so slight impression as in this discussion to be a negligible quantity.

Second.—The distinction under State laws between a tax on the right of succession and a tax on the property transmitted by law or by will has no application to the question, whether within the meaning of the constitution this tax is direct, and if it had this tax is plainly a tax on property and not on the right of succession.

1. The distinction between a tax on the right of succession and a tax on the property passing thereby or thereunder, is so far as the question of direct tax by the United States is concerned, a distinction without a difference and does not affect the direct character of the tax.

A tax on the right of succession falls on the same person, must be paid by the same person, is a lien on the same property, is subject to the same first and ultimate incidence as if it were or be considered as a tax on property.

There is not an element or qualification which has ever been considered inclusively or exclusively as essential to a direct tax or to a tax being considered as direct which does not apply with absolute precision in the same manner to a tax on the succession as to a tax on the property.

The argument that in respect to being a direct tax the circumstance that *in form* it is levied on the succession and not on the property is not material, is a distinction without a difference, is vastly less cogent in respect to an inheritance tax than as to an income tax and yet the very gist of the recent decisions of this Court in the income tax cases is that the tax on income varies in form only and not

in substance from a tax on the property from which the income is derived.

So this Court has held that a tax on a bill of lading is the same thing as a duty on the article which it represented—a tax on the interest payable on bonds is a tax not upon the debtor but upon the security—that a tax upon the amount of sales of goods made by an auctioneer is a tax on the goods sold. "The substance and not the shadow determines the validity of the exercise of the power" (Pollock case, 157 U. S., and cases cited on p. 582).

What possible difference, then, as distinguished from distinction, can be found in the directness of this tax, whether called a tax on the property or a tax on the succession.

Whatever name is given to it, it affects the same persons, the same property and is enforced in the same way.

When we speak of the right to succeed to an object it is the same thing as property in the object.

The word "property" does not denote the article or object merely, it denotes the relation of some person to that object.

The wild bird or animal is not property Reduced to possession, *i. e.*, to a definite relation to a certain person it becomes property.

The right to a succession in the abstract is not property. It lacks an object. The right to the succession to a certain object is *property* and is not distinguishable from property in such object derived in any other way.

All the meaning that possibly can be attributed to it is that *property* derived

from succession shall be taxed in a particular way; but to say that such tax is on the object or on the right is to vary the "form" and not the substance; is to express a distinction without a difference; is to play with shadows rather than to recognize realities.

When the tax is levied or assessed it is and must be levied or assessed against some living person. The deceased cannot be assessed; he is forever beyond the jurisdiction. The persons who after the decease of the testator or intestate own the property are those against whom it is levied. Unless there is an object which had been the property of the deceased and which after his decease became the property of some one else, no tax is levied.

Now I submit that under such circumstances the words "right to inherit or to take by will" such property is simple tantology for "ownership" of such property.

The two expressions are absolutely synonymous, mean with mathematical precision the same thing. If a tax on one is direct so is one on the other and *vice versa*.

Refinements in words and phrases, artful dodges by which the form and not the substance is varied, distinctions founded on the words and not the meaning are to the last degree to be discouraged in the practical administration of the law and most of all in the administration of tax laws.

They are efforts to evade where no evasion should be permitted and no clearer evasion can be imagined than the effort to distinguish the incidence of a tax law on the ownership of an object from one on the right to own it.

2. But even as a distinction and without regard to whether there be a difference, this law is a tax on the property and not on the right.

The law taxes the whole property in the hands of the administrators, &c., and requires them to deduct from the whole property a certain amount from the share of each beneficiary.

This amount varies in two respects. 1st. In respect to closeness of kinship. 2d. In respect to the amount of the whole estate.

The first has relation to the beneficiary. The second has no relation to the beneficiary, but has relation only to the amount of the estate of the deceased.

Now, how can a tax be said to be levied on the right of succession which is levied independently of the right of succession?

A as legatee has a right of succession to $10,000. He has no other interest in the estate. According, however, to the size of the estate to all of which except the $10,000 others have the right of succession, A's legacy is taxed more or less. He is thus taxed for property to which others succeed. Such a tax is plainly on the object and not on the right of succession. The object is taxed in the hands of the administrator, and according to the amount of the estate, although A's interest in such object and right of succession thereto have no relation to the amount of the whole estate.

Third.—On the other points raised in the briefs of my associates I submit the case on their briefs.

I do not argue them because I have nothing to add to the reasons so cogently expressed in their briefs.

It seems difficult to imagine how a tax can be called "uniform throughout the United States," which excludes, by not including, the District of Columbia. It seems difficult to imagine how a tax can be called "uniform" which is based on the purely arbitrary distinction of the size or amount of the object passing to some one because of the death.

I however submit those questions without further remark.

Fourth.—The judgment should be reversed, the demurrer overruled and judgment ordered for the plaintiff on the demurrer.

WHEELER H. PECKHAM,
Of Counsel for Plaintiff in Error.